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In The

Supreme Court of the United States

October Term, 1994

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

vs.

STATE OF RHODE ISLAND, and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE MALT BEVERAGE DISTRIBUTORS ASSOCIATION OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MARY LOU HOGAN
Attorney for Amicus Curiae
The Malt Beverage Distributors Association of Pennsylvania
842 South Second Street
Suite 360
Philadelphia, Pennsylvania 19147
(215) 625-8484

7293
Legal Appellate Services, Inc.
(800) 5 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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STATEMENT OF THE CASE

The Statement of the Case as set forth in Respondents' brief is agreed with.

SUMMARY OF ARGUMENT

The Malt Beverage Distributors Association of Pennsylvania is a state-wide organization representing the interests of both wholesale and retail distributors of malt and brewed beverages. Pennsylvania directly controls all transactions in distilled spirits (liquor) and wines, and has an extensive and comprehensive regulatory scheme to control transactions in malt and brewed beverages through its licensing system of both Importing Distributors and Distributors.

The Pennsylvania Liquor Code is set forth at 47 P.S. § 101, *et seq.*, and governs all trafficking in alcoholic beverages "for the protection of the *public* welfare, health, peace and morals of the people of the Commonwealth . . ." (emphasis added) 47 P.S. § 104. The Pennsylvania courts have construed their purpose to be restraining rather than promoting the sale of liquor, *Bierman v. Pennsylvania Liquor Control Board*, 145 A.2d 876, 188 Pa. Super. 200 (1958) and to protect public health, welfare, peace and morals. *Commonwealth Liquor Control Board v. Starr*, 318 A.2d 763, 13 Pa. Comm. 415 (1974), *aff'd*, 337 A.2d 914, 462 Pa. 124; *Tony Savatt, Inc. v. Latrobe Brewing Company*, 583 A.2d 796, 400 Pa. Super. 296 (1990), *appeal denied*, 593 A.2d 843, 527 Pa. 668, *cert. denied*, 112 S. Ct. 586, 116 L. Ed. 2d 611.

Section 4-498 of the Pennsylvania Liquor Code is identical to Rhode Island Gen. Laws § 3-8-7 which forbids off-premises price advertising of alcoholic beverages. Banning off-premises price advertising protects the public health of the citizens of the Commonwealth in that, as Rhode Island argues, competitive

price advertising tends to lower prices which results in increased consumption and the attendant ills of same. These are public policy decisions made by the legislatures of Rhode Island and Pennsylvania. Because of the powers granted to the states pursuant to the Twenty-first Amendment these restrictions should be upheld by this Court so long as they are found to be reasonable or rational when balanced against conflicting constitutional rights.

In all other respects the Summary of Argument set forth in Respondents' brief is agreed with.

ARGUMENT

THE TWENTY-FIRST AMENDMENT SHOULD BE CONSIDERED IN A COMMERCIAL SPEECH CASE INVOLVING THE REGULATION OF ALCOHOLIC BEVERAGES.

Rhode Island Gen. Laws § 3-8-7 and 3-8-8.1 are restrictions upon commercial speech. Commercial speech is ". . . expression related solely to the economic interests of the speaker and its audience (citations omitted) . . ." and under the First and Fourteenth Amendments is protected from ". . . unwarranted governmental regulation." *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557 (1980). It may be restricted if it meets the test set forth in *Central Hudson, supra*, namely:

> At the outset, we must determine whether the expression is protected by the First Amendment. [I] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [II] Next, we ask whether the asserted governmental interest is substantial.

> If both inquiries yield positive answers, we must determine [III] whether the regulation directly advances the governmental interest asserted, and [IV] whether it is not more extensive than is necessary to serve that interest.

Central Hudson, supra, as cited in *44 Liquormart, Inc. v. State of Rhode Island,* 39 F.3d 5 (1st Cir. 1994). Satisfaction of Parts I and II are not at issue in this case; Parts III and IV are.

The Circuit Court recognized that the state has the burden of proving that the restriction "directly advances" temperance, and "is not more extensive than is necessary." *44 Liquormart, Inc., supra* at page 7; and that the standard or test of the burden of proof is one of reasonableness. This Court applied a reasonableness standard in *California v. LaRue,* 409 U.S. 109, 115, 116 (1972):

> Based on the evidence from the hearings that it cited to the District Court, and mindful of the principle that in legislative rule-making the agency may reason from the particular to the general, *Assigned Car Cases,* 274 U.S. 564, 583, 71 L. Ed. 1204, 47 S. Ct. 727 (1927), *we do not think it can be said that the Department's conclusion in this respect* [that lewd or naked dancing should not be permitted on licensed premises] *was an irrational one.* (emphasis added)

And again, in *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 718 (1981):

> In sort, the elected representatives of the State of New York have chosen to avoid the

> disturbances associated with mixing alcohol and nude dancing by means of a *reasonable* restriction upon establishments which sell liquor for on-premises consumption ... Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, *the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.* (emphasis added)

In the case at bar the Circuit Court meticulously reviewed the testimony compiled in the District Court and found "... in the absence of any affirmative contradiction to rely on ..." that the District Court was not free to hold the Rhode Island statute to be an unconstitutional infringement upon commercial speech. Rhode Island had reasonably proven that its statute satisfied Parts III and IV of the *Central Hudson* test.

In the recent case of *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) this Court applied a similar analysis. The federal statute challenged, Federal Alcohol Administration Act, 49 Stat. 977, 27 U.S.C. § 201 *et seq.*, prohibited disclosure of the alcohol content of beer on labels or in advertising. In the opinion the *Central Hudson* test was applied and again the federal restriction was carefully scrutinized to determine if it met Parts III and IV of that test. It did not because this Court found that the restriction *as applied to beer labels* made no *rational* sense if the true aim of the restriction was to suppress strength wars. *Coors, supra,* at 1592, 1593 (emphasis added). In addition both the District Court, Court of Appeals and this Court found that the government had produced *no credible evidence* supporting its contention that disclosure of alcohol content would promote strength wars. *Coors, supra,* at 1593 (emphasis added). This is not the same factual situation now presented to this Court. Here, the Circuit

Court found the evidence to be equivocal, supporting both Rhode Island's contention that price advertising restrictions promote temperance by lowering the consumption of alcohol and 44 Liquormart's contention that they do not. In this context the Circuit Court upheld the constitutionality of the statute.

It is interesting to note that *Coors, supra,* dealt only with the irrationality of the federal regulation as applied to beer *labels.* This Court did not reach the issue of whether prohibition of disclosure of alcohol content in *advertising* would be rational and permissible. It did not reach this issue because the District Court upheld the ban on disclosure in advertising and Coors chose not to appeal that decision. Viewed in that light, it is not unreasonable to infer that Coors itself saw the form or vehicle of advertising determining the reasonableness of the government's restriction. Consequently, this Court should limit its holding in *Coors, supra,* to the particular facts of that case and not extend it to strike down the Rhode Island statute in question.

The purpose of the Twenty-first Amendment was to return control over transactions in alcoholic beverages to the states. To fulfill that guarantee of rights granted to the states when in conflict with First Amendment rights, be they freedom of expression, *LaRue* and *Bellanca, supra,* or commercial speech, *Coors, supra,* if the state restriction is reasonable or rational in promoting the state scheme of control over alcoholic beverages it should be upheld.

In all other respects the Argument as set forth in Respondents' brief is agreed with.

CONCLUSION

The Conclusion as set forth in Respondents' brief is agreed with.

Respectfully submitted,

MARY LOU HOGAN
Attorney for Amicus Curiae
The Malt Beverage Distributors
Association of Pennsylvania
842 South Second Street
Suite 360
Philadelphia, Pennsylvania 19147
(215) 625-8484